IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4848 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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NADIRBHAI NURUDDINBHAI HIRANI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 4848 of 2001

MR PARESH UPADHYAY for Petitioner No. 1

MR PR ABICHANDANI, AGP for Respondent No. 1-2

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 27/09/2001

ORAL JUDGEMENT

1. Heard ld. counsel Mr. Upadhyay for the petitioner at length. I have also heard ld. AGP Mr. Abichandani for the State. Ld. counsel Mr. Upadhyay for the petitioner has taken me through the averments

made in the petition and relevant documents produced in support thereof. He has mainly relied on the averments made in the affidavit-in-reply filed by the State of Guajrat. The say of the respondent State is that the petitioner was not promoted because he was under the cloud of departmental proceedings. To appreciate the contentions raised by both the sides, I would like to state facts leading to the present petition, in nutsheel.

2. Undisputedly, the petitioner was appointed as Junior Engineer (Mechanical) in the respondent Government and the said cadre is now known in redesignation as Assistant Engineer (Mechanical) and immediate post of promotion is Deputy Executive Engineer (Mechanical). After serving Narmada, Water REsources & Water Supply Department and other departments for several years, the petitioner was due for promotion in the year 2000-2001 along with other colleagues serving in the department. It is not the case of even State that till the date on which Departmental Promotion Committee met, no departmental proceedings were initiated or even contemplated. The petitioner is at Sr. No. 137 in the seniority list of the cadre of Assistant Engineer (Mechanical) published by the respondent authorities on 5.11.1992. Asstt. Engineers who are junior to the petitioners surprisingly were found in the list of order of promotion issued on 28.6.2001 and the petitioner was left out. The grievance of the petitioner is that act of non-promoting the petitioner is violative of Articles 14 & 16 of the Constitution of India. There was no departmental inquiry ever initiated against him. The petitioner was never communicated any adverse remarks in his Annual Confidential Report and that there was no reason or cause to supersede the petitioner.

3. I have considered the case of the respondent department as is pointed out by ld. AGP Mr. Abichandani in paras 3 to 5 of the affidavit-in-reply filed by the State. Affidavit-in-reply itself is clear to the effect that the petitioner was found fit for promotion and his name was recommneded to the GPSC and list was cleared and approved by the GPSC. The documents attached to the affidavit-in-reply show that for the first time on 23.7.2001, department issued a charge memo for the alleged wrong committed by the petitioner in the year 1992. Description of the allegations and list of the docuemnts referred in the statement indicates that the alleged wrong was within the notice of the higher officers of the department. I have considered nature of allegations reflected in the charge memo served to the petitioner and amount involved. It seems that for

several years, the department was not even clear as to who paid amount in excess to the contractor and from whom the excess amount paid is to be recovered. Some correspondence was there between two Executive Engineers namely Ex.Engineer, Rajkot and Ex.Engineer, Gandhinagar, in this connection.

4. Ld. counsel Mr. Upadhyay has mainly relied on the set of facts available on record and has submitted that as the petitioner was never served with the chargesheet and departmental inquiry was not even contemplated on the day on which DPC met, there was no reason for the department for not promoting the petitioner along with other colleagues. Ld. counsel Mr. Upadhyay has taken me through number of decisions on settled legal position in this regard. By relying on the decision in the case of Union of India v/s K.V. Jankiraman, reported in AIR 1991 SC 2010, known as Janki Raman's case. He has submitted that in the cited case the delinquent was served with chargesheet and sealed cover procedure was followed, whereas in the present case, name of the petitioner was very well in the select list and said select list was also approved by the GPSC. As there was no departmental inquiry either contemplated or pending against the petitioner, sealed cover procedure was not required to be followed. So, ratio propounded in Janki Raman's case (supra) clearly applies to the facts of the preent case with more vehemence. Relying on the decision in the case of State of M.P. v/s Bani Singh & Anr. reported in AIR 1990 SC 1308, ld. counsel Mr. Upadhyay has pointed out that looking to the date of alleged wrong, non-initiation of Departmental Proceedings for several years and act of serving charge memo after 18 years, would give rise to a cause whereby the petitioner can pray for even dropping of charge. However, the prayer of the present petitioner is limited to the effect that his hampered right to be promoted to the higher post should be upheld and he should be given promotion accordingly with all consequential benefits. Ld. counsel Mr. Upadhyay has also relied on the decision in the case of Delhi Jal Board v/s Mahinder Singh, reported in JT 2000(10) SC 158, wherein the Apex Court has held as under:-

> "The right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyanace till the result of any

pending disciplinary inquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed. The mere fact that by the time the disciplinary proceedings in the first inquiry ended in his favour and by the time the seal weas opened to give effect to it, another departmental inquiry was started by the department, would not come in the weay of giving him the benefit of the assessment by the first Departmental Promotion Committee in his favour in the anterior selection."

5. In view of above accepted settled legal proposition of law, I am satisfied that the petitioner, illegally and in violation of Articles 14 & 16 of the Constitution of India, is denied the promotion to the higher post. On the letter of Vigilence Commission dated 29.3.2000 department had taken conscious decision to initiate departmental inquiry against the petitioner in November 2000 and it seems that till then the department itself was confused. Govt. Resolutin dated 20.9.1993 also takes care of the situation. I am surprised why the Government has taken negative stand in the matter and so the stand taken by the Government is apparently arbitrary and wrong. Without commenting up this aspect, in the facts and circumstances of the case and in view of settled legal position, this petition requires to be allowed.

6. I would like to quote some observations of this Court (Coram : N.N. Mathur, J) in the case of Valimad Pirbhai Sunesdara v/s State of Gujarat, in the decision dated 7.7.1998 in Spl.C.A. No. 744/1998 :-

" Thus, the consistent view of the apex Court is that ordinarily a promotion should not be withheld merely because some disciplinary or criminal proceedings are pending against the employee. Possibility cannot be ruled out that investigation of the preliminary enquiry may be kept pending deliberately to deprive a person of the promotion. There are also cases where even though prompt decision is taken, the governemnt employee avoids service of the chargesheet till the date of the meeting of the Departmental Promotion Committee is convened. Thus, to struck balance, the only rational view can be taken is to cast duty on the Department not only to take a conscious decision to initiate the departmental

> proceedings, but also frame the charges and to take effective and sincere steps to serve on the employee. ... . In the instant case, the alleged incidents are of the year 1991. A show cause notice was served as late as in 1994. In spite of the fact that the notice was replied in 1994, it took two years to take a conscious decision to initiate departemntal enquiry only in November/ December 1998. During this period, when D.P.C. met in 1997, except conscious decision, neither the charges were framed, and as such obviously no steps for service were taken. This speaks volumes if not mala fide, lethargy on the part of respondent, for which a person cannot be dfenied of his right to consideration of promotion on the highest post."

7. Normally, the Court while exercising the jurisdiction under Article 226 of the Constitution, should not direct the department to promote a particular delinquent. However, this being a case where the name of the petitioner was in select list approved by the GPSC, coupled with the fact that sealed cover procedure was applied wrongly and undisputedly the juniors to the petitioner are promoted from the very select list, this is fit case where mandatory orders are required tobe passed against the respondents granting reliefs as prayed for by the petitioners, irrespective of pendency of the departmental proceedings now pending.

8. In the result, petition is allowed. Respondents are hereby directed to promote the petitioner Nadirbhai Nurruddinbhai Hirani on the post of Deputy Executive Engineer (Mechanical) with effect from 28.6.2001 i.e. the day on which juniors to the petitioner are promoted, with all consequential benefits. Respondents are directed to promote the petitoner within three weeks from the date of receipt of writ of this order and shall pay all the consequential benefits including arrears amount within a one month thereafter. Rule is made absolute accordingly. No costs.

Direct Service is permitted.

27.9.2001 [C.K. BUCH, J]
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